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No. 06-1588

IN THE

Supreme Court of the United States

CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION,
Petitioners,

v.

CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION; JOSEPH PAKOOTAS; WENATCHI CONSTITUENT TRIBE; JOHN ST. PIERRE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court below correctly held that res judicata does not apply to bar an Indian tribe's claim for fishing rights asserted under an 1894 Agreement with the United States, when that claim was not, and could not have been, litigated in an earlier proceeding that adjudicated whether the tribe had fishing rights under a separate 1855 treaty?

2. Whether this Court should deny review where petitioner now asserts an argument on judicial estoppel that was neither asserted nor decided below?

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OPINIONS BELOW

The decision of the Court of Appeals (Pet. App. 1a-19a) is reported at 470 F.3d 809 (9th Cir. 2006). The decision of the district court (Pet. App. 20a-36a) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 4, 2006. A petition for rehearing was denied on February 28, 2007 (Pet. App. 37a-38a). The petition for a writ of certiorari was filed on May 29, 2007 and docketed on

May 31, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

INTRODUCTION

The background to this case is a dispute over whether an 1894 Agreement between the Yakama Nation and the United States provides certain fishing rights to the Wenatchi Indians, who are now a constituent tribe of the Confederated Tribes of the Colville Reservation. In 2003, the district court enjoined fishing by the Wenatchi at their ancestral fishing station, holding that they are barred by res judicata from asserting any rights under the 1894 Agreement because the Colville Tribes in an earlier proceeding had unsuccessfully asserted a claim for fishing rights under a separate 1855 Treaty. The Court of Appeals for the Ninth Circuit reversed, holding that res judicata does not apply because the district court in the earlier proceeding had imposed conditions that precluded Colville from asserting the rights of the Wenatchi under the 1894 Agreement.

The res judicata ruling below raises no novel or substantial questions. It was issued by a unanimous panel, and not a single judge on the Ninth Circuit voted for rehearing en banc.

The ruling raises no conflict between the Ninth Circuit and other Circuits regarding the appropriate standard for claim preclusion, nor does the Ninth Circuit's decision conflict with the *Restatement (Second) of Judgments* (1982). Even if it did, any such conflict with a secondary source is not a reason for review by this Court.

Yakama also urges the Court to grant review to determine if the Colville defendants should be barred under the doctrine of judicial estoppel. This argument was neither made below nor addressed by the Ninth Circuit. Moreover, it raises no novel or substantial questions, and is wrong on the merits.

The petition for a writ of certiorari should be denied.

STATEMENT OF THE CASE

A. Factual Background.

In Article 10 of the Treaty of 1855 with the Yakama Nation, 12 Stat. 951 (June 9, 1855) (Pet. App. 40a-49a), the Wenatchi Indians were provided a six square mile reservation located at Wenatshapam, their traditional fishery at the confluence of Icicle Creek and the Wenatchee River in the State of Washington. *United States v. Oregon*, 470 F.3d 809, 811 (9th Cir. 2006) (Pet. App. 5a). The United States failed in its obligation to survey and set aside the Wenatchi reservation, and non-Indian settlers and a railroad company progressively made encroachments upon the land. *Id.* at 811-12 (Pet. App. 5a-7a). When a survey was finally undertaken in 1893, a U.S. Indian Agent directed the surveyor to locate the reservation far from its intended location at the Wenatshapam fishery, in an apparent effort to placate the white settlers who opposed the reservation. *Id.* at 812 (Pet. App. 6a). The mis-surveyed reservation was of no use to the Wenatchi, and rather than locate the reservation correctly, the United States instead determined to buy it from the Indians. *Id.* (Pet. App. 6a-7a.)

Negotiations were held in the winter of 1893-94, culminating in an agreement, ratified by Congress in 1894, for the Yakama Nation to sell the Article 10 reservation to the United States for $20,000. Agreement with the Yakima Nation of Indians in Washington, 28 Stat. 320 (1894) ("1894 Agreement") (Pet. App. 50a-54a). The Agreement also promised the Wenatchi that they would receive allotments of land at Wenatshapam, where they lived, and a non-exclusive right to fish there. *Id.*

The United States again failed in its obligations to the Wenatchi, allotting only a handful of the dozens of promised allotments. The tribe fell into poverty, and the United States eventually moved most members to the Colville Reservation,

where they became the Wenatchi Constituent Tribe of the Confederated Tribes of the Colville Reservation.

B. Procedural History.

United States v. Oregon was first filed in 1968 to determine Indian off-reservation fishing rights in the Columbia River and its tributaries. The United States, on behalf of certain Indian tribes, asserted those tribes had rights to fish at "all usual and accustomed places" under the 1855 Treaty with the Yakama Nation (and also under the Treaty of 1855 with the Nez Percés, 12 Stat. 957 (June 11, 1855)).

In 1989, the Colville Tribes, a tribal confederation organized under an 1872 Executive Order (Exec. Order of April 9, 1872) sought to intervene in the case on behalf of five of its constituent tribes (including the Wenatchi) that were parties to the 1855 treaties, in order to participate in the management of the Columbia River fishery. *See United States v. Oregon,* 787 F. Supp. 1557 (D. Or. 1992). The district court (the Hon. Malcolm F. Marsh) "made it clear that Colville had to establish, as a condition to intervention, *treaty rights* under the 1855 treaties." 470 F.3d at 815 (Pet. App. 13a). The district court ultimately denied intervention, finding that Colville had failed to show it was "'the present day holder of *treaty rights.*'" 470 F.3d at 814 (Pet. App. 11a) (quoting *United States v. Oregon,* 787 F. Supp. at 1572). The Ninth Circuit affirmed, holding that the Colville Tribes did not have treaty fishing rights under the 1855 Treaty. *United States v. Oregon*, 29 F.3d 481 (9th Cir. 1994), *modified*, 43 F.3d 1284 (9th Cir. 1994).

The Wenatshapam fishery is now the site of a federal fish hatchery. The hatchery in recent years has allowed local Indians to catch fish surplus to the hatchery's needs. During the 2003 spring fishing season, Yakama sought an injunction against the Colville Wenatchi to bar their fishing at Wenatshapam, claiming that Yakama has exclusive rights to

fish at that station.[1] The Colville defendants argued in response that the Wenatchi had fishing rights at Wenatshapam secured by the 1894 Agreement.

The district court (the Hon. Garr M. King) held that the Colville defendants were precluded from asserting a defense to the injunction based on their rights under the 1894 Agreement, because those rights could have been, but were not, asserted in the prior intervention proceedings. *United States. v. Oregon*, No. 68-513-KI, slip op. (D. Or. Aug. 18, 2003) (Pet. App. 20a-36a). In so ruling, Judge King discounted the express condition on intervention—that the Colville prove 1855 *treaty* rights—that had been imposed by Judge Marsh. *Id.* at 9-11 (Pet. App. 30a-34a). The district court granted a permanent injunction against Colville Wenatchi fishing at the tribe's traditional fishery, without reaching the meaning or effect of the 1894 Agreement. *Id.* at 12 (Pet. App. 34a).

The Colville defendants appealed to the Ninth Circuit. That court unanimously held that the question of whether the 1894 Agreement provided fishing rights to the Wenatchi was not decided, *and could not have been decided*, in the intervention case because of the conditions on intervention imposed by Judge Marsh. 470 F.3d at 815-17 (Pet. App. 13a-17a). The court found that the proceeding in which Colville tried to intervene was "expressly limited to the adjudication of the 1855 Treaty rights," *id.* at 816 (Pet. App. 15a), and that "[t]he 1855 Treaty and the 1894 Agreement . . . present entirely different transactional nuclei." *Id.* The Ninth Circuit therefore held that the Colville defendants are not now precluded from asserting rights under the 1894 Agreement, and remanded the case for the district court to adjudicate the rights conferred by the 1894 Agreement, an issue never

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[1] Yakama filed a similar motion a year earlier, in 2002, but ultimately withdrew it.

before resolved by any court. Referring to the effect on the Wenatchi of the res judicata bar imposed by the district court, the Ninth Circuit said, "[t]hrough unfulfilled promises and procedural rulings, they would, under that ruling, lose both the land they were guaranteed adjacent to the fishery and their fishing rights." *Id.* at 813 (Pet. App. 9a).

Yakama's petition for rehearing and suggestion for rehearing en banc was denied on February 28, 2007, without any votes in favor (Pet. App. 37a-38a).

REASONS FOR DENYING THE WRIT

I. THE NINTH CIRCUIT'S APPLICATION OF THE "TRANSACTIONAL NUCLEUS" TEST IS NOT IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS.

The gravamen of Yakama's petition is its claim that the Ninth Circuit applied a "pinched construction" of the transactional nucleus of facts test (Pet. 15), whereas section 24 of the *Restatement (Second) of Judgments* and the circuits that follow it allegedly apply a "broader" construction. (Pet. 12.) However, the cases cited by Yakama do not bear out its contention that there is a conflict between circuits as to the breadth of the test.

The overriding consideration in an analysis of claim preclusion is whether the party to be precluded had a "full and fair opportunity" to litigate its claim in the earlier litigation. *Kremer v. Chem. Const. Corp.*, 456 U.S. 461, 481 n.22 (1982). The Ninth Circuit based its ruling on its finding that Judge Marsh's conditions on intervention had entirely foreclosed Colville from litigating rights under the 1894 Agreement in the intervention proceeding. 470 F.3d at 817 (Pet. App. 18a) ("The rights of the Wenatchi Tribe under the 1894 Agreement were not litigated, nor could they have been brought in that proceeding because, as we have discussed, the

condition for intervention was not met."); *id.* at 818 (Pet. App. 18a).

Although this consideration alone was sufficient to dispose of Yakama's claim preclusion argument, the Ninth Circuit also considered Yakama's contention that Colville's claim of fishing rights for the Wenatchi at Icicle Creek under the 1894 Agreement could have been raised in the intervention proceeding because that Agreement was part of the same transactional nucleus of facts as the Colville claim of off-reservation fishing rights for its members under the 1855 Treaty. The court considered the history of the two documents, 470 F.3d at 811-13 (Pet. App. 3a-9a), and correctly concluded that the Treaty and the Agreement presented "entirely different transactional nuclei." 470 F.3d at 816 (Pet. App. 15a). The court noted that the Treaty and the Agreement were different documents, entered into almost four decades apart, providing different rights, and that the latter was not set forth as an amendment to the former, but rather as an entirely new agreement. *Id.* at 811-13, 816 (Pet. App. 3a-9a, 14a-15a).

As the court's evaluation of the "independen[ce]" of the two documents indicates, *id.* at 816 (Pet. App. 15a), the Ninth Circuit has adopted the pragmatic transactional test set forth in section 24 of the *Restatement* (*Second*).[2] Despite failing to argue (or even to cite) the section 24 factors to the Ninth Circuit,[3] Yakama now complains that "the court below completely failed to use the proper factors for determining a

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[2] *E.g., Sidney v. Zah*, 718 F.2d 1453, 1459 (9th Cir. 1983) (citing transactional approach of section 24 with approval and noting that whether the claim "arise[s] out of the same 'transactional nucleus of facts' [is] the criteria most stressed in our decisions").

[3] Section 24 is not cited even once in Yakama's merits brief below, and it appears in Yakama's petition for rehearing only as a parenthetical embedded in a case citation inside a block quote. (*See* Yakama Pet. for Reh'g 6.)

'series' of transactions—whether they are related 'in time, space, origin, or motivation . . . .'" (Pet. 14-15 (quoting *Restatement* (*Second*) § 24(2))). Yakama also failed to make this "series" argument below, contending instead that the 1855 Treaty and the 1894 Agreement were parts of the *same* transactional nucleus, not a "series" of transactions under section 24.[4] Nevertheless, the Ninth Circuit's decision is entirely consistent with the *Restatement* (*Second*) "series" approach as applied by other circuits.

The decision below is consistent with the Tenth Circuit's decision in *Petromanagement Corp. v. Acme-Thomas Joint Venture*, 835 F.2d 1329 (10th Cir. 1988), cited by Yakama, which found plaintiff Petromanagement's second suit barred by claim preclusion under the "series" approach of section 24. *Id.* at 1336. There, the parties entered into an oil and gas exploration option agreement that had a model turnkey drilling contract and a model operating agreement attached as exhibits to the option agreement. Five wells were drilled under the option agreement, with individual turnkey and operating contracts for each well.

In its first complaint, Petromanagement alleged that the defendants had failed to meet their contractual obligations under the option agreement. In its second complaint, filed shortly before the first action was to go to trial, Petromanagement alleged that it had been fraudulently induced to enter into the individual contracts for each of the five wells. After its motion to consolidate the two actions was denied, Petromanagement stipulated to a dismissal with prejudice of its first suit, and the trial court then granted the defendants' motion to dismiss the second suit due to claim preclusion. *Id.* at 1332.

The Tenth Circuit's decision is not in conflict with the Ninth Circuit's decision here, for multiple reasons. First, in

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[4] *See* Yakama Merits Brief 29, 32; Yakama Pet. for Reh'g 4-5.

holding the second suit barred, the Tenth Circuit noted that under section 24, "a contract is generally considered to be a transaction." *Id.* at 1336 (internal quotation marks omitted). The court reasoned that "even if the severable parts of a divisible contract are considered separate transactions, we believe their *presence within the same document* is sufficient for claim preclusion under the 'series of connected transactions' language of § 24." *Id.* (emphasis added). In the case at hand, by contrast, there is no question that the 1855 Treaty and the 1894 Agreement are entirely separate documents and separate agreements. Indeed, the 1894 Agreement is not even an amendment to the 1855 Treaty. 470 F.3d at 812, 816 (Pet. App. 7a, 15a).

Second, although this factor is not explicitly discussed by either court, the option and the model contracts in *Petromanagement* were identical in time,[5] the factor listed first in section 24(2) as a consideration in determining what constitutes a "transaction" or a "series." In the case at bar, however, the Treaty and the Agreement were separated by thirty-nine years and thus reflected different eras in federal Indian policy; were negotiated, drafted, and signed by different individuals; and were subject to different pressures and motivations.

Finally, so far as appears from the *Petromanagement* opinion, there was no particular reason why the plaintiff failed to bring all of its claims in the first action. The Colville defendants, on the other hand, were prevented from doing so by Judge Marsh's conditional intervention order which, as the Ninth Circuit found, required the Colville defendants to establish rights under the 1855 Treaty, not the 1894 Agreement. 470 F.3d at 815 (Pet. App. 13a) ("In order to intervene in the action . . . , Judge Marsh made it clear that Colville had to

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[5] Accordingly, the option and model contracts should not be characterized as "successive contracts," as Yakama terms them. (Pet. 12.)

establish, as a condition to intervention, *treaty rights under the 1855 treaties*." (emphasis partially added)).

Nor does the Ninth Circuit's decision conflict with the other Tenth Circuit case cited by Yakama. In *King v. Union Oil Co.*, 117 F.3d 443 (10th Cir. 1997), an employment case, the plaintiff's first complaint alleged discriminatory termination and the second complaint alleged the unlawful failure to pay severance benefits. The court found that the termination and the later denial of benefits were related transactions, based on, among other factors, their close proximity in time (within a four month period) and the substantial overlap of related facts. *Id.* at 445. For that reason, the Tenth Circuit found that claim preclusion applied to the plaintiff's failure to litigate the benefits claim as part of the first action on discriminatory termination.

The difference in result between the Ninth Circuit's decision here, and the Tenth Circuit's decisions in *Petromanagement* and *King*, does not illustrate a conflict in law or analysis, but rather the inevitable differences in applying the same legal standards to very different fact patterns.

Nor does the Ninth Circuit decision here conflict with any decision of the Eleventh Circuit. In *Trustmark Ins. Co. v. ESLU, Inc.*, 299 F.3d 1265 (11th Cir. 2002), cited by Yakama, the plaintiff was barred by res judicata from bringing a second lawsuit alleging breach of a "Termination Amendment" to a contract litigated in the first lawsuit. The Eleventh Circuit held that the provision at issue in the second case "was an amendment to [the original] contract—not a separate contract." 299 F.3d at 1270 n.3. Because the provision was not "an entirely separate contract for res judicata purposes," *id.*, the court held that the plaintiff should have brought those claims in the first suit.

By contrast here, as already noted, the Ninth Circuit specifically held that the 1894 Agreement was not an amendment

to the 1855 Treaty, but an entirely separate agreement. 470 F.3d at 812, 816 (Pet. App. 7a, 15a). Moreover, in *Trustmark*, the original contract and the amendment were separated by at most four years (1994 to 1998), whereas in the case here the separation is closer to four decades. Also, the plaintiff in *Trustmark* had every opportunity in the first case to have raised the claims it brought in the second case, but failed to do so in a timely fashion. *Trustmark Ins. Co. v. ESLU, Inc.*, No. 6: 99-cv-1207-ORL-22JGG, slip. op. at 3 (M.D. Fla. April 13, 2001). Here, the Colville defendants had no such opportunity; indeed, they were expressly barred by the district court in the first suit from raising their claims under the 1894 Agreement.

Thus, the decision below is not in conflict with the application of section 24 of the *Restatement* (*Second*) by other circuit courts.[6] And therefore it follows that the decision here is not in conflict with section 24 itself. Indeed, as the comparison of the *Oregon* and *Petromanagement* decisions showed, both decisions were equally faithful to section 24.

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[6] The Colville defendants do not understand Yakama to argue (nor could it reasonably argue) that the Ninth Circuit's decision is in conflict with *Lane v. Peterson*, 899 F.2d 737 (8th Cir. 1990), which Yakama quotes simply to summarize the policy reasons informing the section 24 approach. (Pet. 13-14.)

United States v. Cunan, 156 F.3d 110 (1st Cir. 1998), and *Manego v. Orleans Bd. of Trade*, 773 F.2d 1 (1st Cir. 1985), are First Circuit decisions cited by Yakama for the proposition that the test under the section 24 approach is not whether the legal theory is different in the second action but whether the factual basis is essentially, even if not exactly, the same. (Pet. 12.) The facts of these two cases are not such that they support Yakama's new argument that the 1855 Treaty and the 1894 Agreement are a series of connected transactions, and the Colville respondents do not argue that a difference in legal theory suffices to avoid claim preclusion.

II. IT IS UNNECESSARY AND INAPPROPRIATE FOR THE COURT TO ADDRESS WHETHER THE *RESTATEMENT* (*SECOND*) EMPLOYS A "PRAGMATIC TRANSACTIONAL TEST."

Yakama's first question presented, whether section 24 of the *Restatement* (*Second*) "uses a pragmatic transactional test" in determining whether a claim is precluded (Pet. i), is not an appropriate question for decision by this Court. *See* Supreme Court Rule 10. In any event, the Court has already characterized section 24's approach as "pragmatic." *Nevada v. United States*, 463 U.S. 110, 130 n.12 (1983). Further, the type of test employed by section 24 of the *Restatement* (*Second*) was not an issue in this case below (indeed, Yakama did not rely on section 24 in the Ninth Circuit), and as explained above (see Part I, *supra*), the Ninth Circuit's decision is entirely consistent with that test. However, the Colville defendants do take issue with Yakama's characterization of the section 24 test as causing a "revolution," (Pet. 11), in the law of claim preclusion and as being "much broader in scope than past standards . . . ." (Pet. 12.) Indeed, in discussing the tests set forth in the *Restatement* and the *Restatement* (*Second*), this Court in *Nevada* found it unnecessary to "parse any *minute differences* which these differing tests might produce . . . ." 463 U.S. at 131 (emphasis added). The Court also pointed out that "the result would be the same under either version of the Restatement of Judgments . . . ." *Id.* at 130 n.12. This is hardly the stuff of revolutions.

Moreover, the Court in *Nevada* indicated, at least with respect to the first *Restatement* and presumably by extension with respect to the second, that the test put forth by the *Restatements* is not the only acceptable test for applying claim preclusion. 436 U.S. at 130 n.12 (stating and illustrating that the "same evidence" standard of the first *Restatement* was not the only standard in use). In the present case, the Ninth Circuit did in fact apply an analysis that is entirely

consistent with that of the *Restatement* (*Second*) to reach the correct result.

III. YAKAMA'S JUDICIAL ESTOPPEL ARGUMENT DOES NOT WARRANT REVIEW BY THIS COURT.

For three reasons, Yakama's argument that the Colville defendants should be judicially estopped does not merit attention from this Court.

First, Yakama never argued the doctrine of judicial estoppel to the Ninth Circuit—not in its merits brief and not in its petition for rehearing. This Court does not ordinarily consider arguments neither raised nor addressed below. *E.g.*, *Travelers Cas. & Sur. Co. of America v. Pacific Gas & Elec. Co.*, __ U.S. __, 127 S. Ct. 1199, 1207 (2007); *TRW Inc. v. Andrews*, 534 U.S. 19, 33-35 (2001). This alone is sufficient basis to reject Yakama's estoppel argument.

Second, Yakama does not even allege that its judicial estoppel argument raises a novel or substantial question or otherwise satisfies any of the considerations for review identified in Supreme Court Rule 10. Given this, the argument does not deserve the attention of this Court.

Third, Yakama's estoppel argument fails on its merits. Yakama is incorrect in claiming that the Colville defendants have changed position on whether it is the Colville tribal government or the Wenatchi Constituent Tribe that is entitled to take legal action to assert rights under the 1894 Agreement. *Compare* 470 F.3d at 813 (2006) (Pet. App. 9a) ("Colville, on behalf of its constituent tribe, the Wenatchi, defends on the ground of rights granted to the Wenatchi by the 1894 Agreement . . . ." (emphasis added)) *with United States v. Oregon*, 29 F.3d 481, 483 (9th Cir. 1994) ("It is not disputed that Colville is the only entity that can legally act on behalf of members of the Confederated Tribes . . . ."), *modified by* 43

F.3d 1284 (9th Cir. 1994). There is no inconsistency between Colville's position in 1994 and its position today.[7]

So too, Yakama's assertion that the Colville defendants have changed positions as to whether the 1894 Agreement grants fishing rights to the Wenatchi is without merit. Yakama's citation to the agreed facts in the intervention proceeding (Pet. 19-20) shows only that, in the different context of litigating intervention, there was "no mention" (Pet. 20) of the 1894 fishing rights at Wenatshapam. Because Judge Marsh's conditions on intervention prevented Colville from litigating any particular source of rights until it first had established a general 1855 Treaty right, silence as to the rights stemming from the 1894 Agreement was an appropriate (indeed, mandated) course then. But silence does not merit a finding of estoppel. *See Zedner v. United States*, ___ U.S. ___, 126 S. Ct. 1976, 1987 (2006) ("'First, a party's later position must be *clearly inconsistent* with its earlier position.'" (emphasis added) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001))). *Accord Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990) (noting estoppel applies "to bar a party from making a *factual assertion* in a legal proceeding which *directly contradicts* an earlier assertion . . . ." (emphasis added) (*cited in New Hampshire*, 532 U.S. at 750))).

Thus, Yakama's estoppel argument fails on its merits, was not raised below, and does not satisfy the standard for review by this Court.

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[7] It should also be noted that Colville and the Wenatchi were *defendants* in the action below, because it was *Yakama* who designated the Wenatchi Constituent Tribe as a named party.

CONCLUSION

The petition for writ of certiorari should be denied.

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